Date: 19970617 Docket: C.A. 136304

NOVA SCOTIA COURT OF APPEAL
Cite as: Zanzibar's Unisex Hairstyling Ltd. v. Bourque, 1997 NSCA 114
Hallett, Roscoe and Flinn, JJ.A.

BETWEEN:

ZANZIBAR'S UNISEX HAIRSTYLING LIMITED and David G. Coles Appellant	Peter J. Driscoll for the Appellant
- and -	
SHIRLEY A. BOURQUE and THE LABOUR STANDARDS TRIBUNAL and THE DIRECTOR of the Tribunal OF LABOUR STANDARDS Respondents	Shirley A. Bourque in person Alexander M. Cameron for the Respondent Tribunal and Directors Appeal Heard: June 2, 1997 Judgment Delivered: June 17, 1997

THE COURT: Appeal dismissed per reasons for judgment of Flinn J.A.; Hallett and Roscoe JJ.A. concurring.

FLINN, J.A.:

Following a complaint under the **Labour Standards Code**, R.S.N.S. 1989, c. 246 (the **Code**) by the respondent employee, the Director of Labour Standards determined that the appellant employer contravened the provisions of s. 72 of the **Code**, by terminating the employment of the employee, without notice, or pay in lieu of notice. Since the respondent employee had in excess of ten (10) years of service with the employer, the employer was ordered to pay the employee eight (8) weeks' pay in lieu of notice; together with vacation pay. The employer appealed the Director's order to the Labour Standards Tribunal, claiming that the employee had not been "fired" as alleged in the complaint. The employer's position was that the employee had quit. Following a hearing by the Labour Standards Tribunal, the Tribunal decided that the employer had contravened s. 72 of the **Code**, in terminating the employee; and the Tribunal confirmed the order of the Director.

Section 72(1) of the **Code** provides as follows:

> 72 (1) Subject to subjection (3) and Section 71, an employer shall not discharge, suspend or lay off an employee, unless the employee has been guilty of wilful misconduct or disobedience or neglect of duty that has not been condoned by the employer, without having given at least
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> (a) one week's notice in writing to the person if his period of employment is less than two years;
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> (b) two weeks' notice in writing to the person if his period of employment is two years or more but less than five years;
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> (c) four weeks' notice in writing to the person if his period of employment is five years or more but less than ten years;
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> (d) eight weeks' notice in writing to the person if his period of employment is ten years or more.

The employer appeals to this Court, and its grounds of appeal are as follows:

a. That the Labour Standards Tribunal was without jurisdiction to affirm the order of the Director because the Director's order was *void ab initio*. The employer contends that the Director was required, as a condition precedent to any order, to endeavour to effect a settlement between the parties, which, the employer alleges, he failed to do in this case;

b. That the Labour Standards Tribunal erred in law in determining that the employee's conduct did not justify, in law, her summary dismissal by the employer; and

c. That the Labour Standards Tribunal erred in law in misapprehending the evidence; and/or failing to ascribe sufficient and/or proper weight to the evidence in determining that the employer was obligated to provide the employee with pay in lieu of notice upon her termination.

The First Ground of Appeal

The relevant parts of s. 21 of the **Code** provide as follows:

> 21 (1) Where the Director receives a complaint in any form alleging that there has been a failure to comply with this Act, he or a person designated by him shall inquire into the complaint and endeavour to effect a settlement.
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> . . . . .
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> (3) Where, after inquiry pursuant to subsection (1) or (2), the Director concludes that an employer or an employee has contravened a provision of this Act and he has been unable to effect a settlement, or an employer or

> employee has contravened the terms of a settlement under this Section, the Director may, in writing, order the contravening employer or employee to
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> > (a) do any act or thing that in the opinion of the Director constitutes full compliance with this Act; and
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> > (b) rectify an injury caused to the persons injured or make compensation therefor,
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> . . . . .
>
> (emphasis added)

"Director" is defined in s. 2(b) of the **Code** as meaning:

> ...the Director of Labour Standards or other officer of the Department of Labour designated by the Minister to administer this Act, and any person acting under the control and direction of the person designated by the Minister to administer this Act;

The employer argues that it is a condition precedent to the Director making an order under s. 21(3) of the **Code**, that the Director endeavour to effect a settlement of the complaint. The employer submits that in this case the Director did not attempt to effect a settlement; and therefore his order is *void ab initio*.

In considering this same submission, the Tribunal concluded:

> We find that the efforts made by Mr. Zwicker in this case satisfied the requirements of section 21(1), and that the Director's Order made under 21(3) likewise is not flawed in that respect.

Under the circumstances of this case, the Tribunal was, in my opinion, correct in this conclusion.

Mr. Peter Zwicker is a Labour Standards Officer with the

Department of Labour. He was charged with the responsibility of investigating the employee's complaint in this case. Mr. Zwicker testified at the hearing before the Labour Standards Tribunal that, in the course of investigating the complaint, he had discussions with both the employer and the employee. The employee's position was that she had been fired. The employer's position was that the employee quit before she could be fired. He testified that "both employee and employer were steadfast in their positions"; and further, that "at that point in time there didn't seem to be an interest in trying to resolve" (the complaint). He further testified that, based on his experience in dealing with these kinds of complaints, he made a judgment call that it would not "make any sense to have a settlement offer". The result of his investigation, he testified, was his recommendation, to the Director, that there had been a contravention of s. 72 of the **Code**, and that the employee was entitled to eight weeks' pay in lieu of notice.

Because Mr. Zwicker recommended to the Director that there had been a contravention of s. 72 of the **Code**, it is a reasonable inference that Mr. Zwicker accepted the employee's version of the events surrounding the termination of employment. Given those circumstances, the intransigence of both employer and employee, and the lack of interest of either party in trying to resolve the complaint, there was nothing further required of Mr. Zwicker than that which he did. He made a judgment call, based on his experience in dealing with these complaints, that under these circumstances it would have been fruitless to seek from either party an expression of interest in settlement.

My views with respect to this are strengthened by the following facts. During the course of the investigation the employer never expressed any interest in making a settlement proposal. In the notice of appeal of the Director's order, to the Labour Standards Tribunal, there is no mention of any failure on the part of the Director, to endeavour to settle the complaint. When the employer testified before the Tribunal, the subject of the failure of the Director to endeavour to settle the complaint was not canvassed in any way. The employer, for example, did not testify that she would have been prepared to make a settlement proposal. In fact, the employer's argument that the Director did not endeavour to settle the complaint was not even made until all of the evidence with respect to the complaint was heard. It was as a result of this argument that the tribunal hearing was adjourned to permit Mr. Zwicker to testify as to the conduct of his investigation.

I would dismiss this ground of appeal.

The Second and Third Grounds of Appeal

Section 20 of the **Code** is relevant for the purpose of considering the standard of judicial review with respect to these grounds of appeal:

> 20 (1) If in any proceeding before the Tribunal a question arises under this Act as to whether
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> (a) a person is an employer or employee;
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> (b) an employer or other person is doing or has done anything prohibited by this Act,
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> the Tribunal shall decide the question and the decision or order of the Tribunal is final and conclusive and not open to question or review except as provided by subsection (2).
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> (2) Any party to an order or decision of the Tribunal may, within thirty days of the mailing of the order or decision, appeal to the Nova Scotia Court of Appeal on

> a question of law or jurisdiction.....

The appellant does not argue that the tribunal erred in the interpretation of s. 72 of the **Code**, in which case the standard of review, by this court, would be correctness (see **Ben's Ltd. v. Decker et al.** (1995), 142 N.S.R. (2d) 371 per Hallett, J.A. at p. 376).

The essence of counsel's argument, with respect to the second and third grounds of appeal, is that the employee wilfully misconducted herself in failing to obey a direct order of her employer, thereby justifying her immediate dismissal without notice or pay in lieu of notice. Counsel states that the tribunal misapprehended the evidence in this regard, and erred in law in determining that the employer was not justified in immediately dismissing the employee.

These findings, by the tribunal, are essentially factual findings. They can be set aside if there is no evidence to support them or if they are patently unreasonable (see **Conrad v. Scott Maritimes Ltd.** (1996), 151 N.S.R. (2d) 203 per Chipman, J.A. at p. 211).

The following summary of the facts, which gave rise to the complaint in this case, is set out in the decision of the Tribunal.

> The Complainant was a hair stylist who commenced employment with the Respondent in 1981, and worked until September 29, 1995. Ms. Zalina Hook is the owner of the Respondent company, which employs six stylists. She testified concerning an incident regarding the Complainant and one of her clients. On September 22, one of the Complainant's clients had tendered her credit card for payment of a $41.73 bill, and it was not accepted by the machine. The Complainant called in Ms. Hook, who called the toll free number for assistance, more than once. There was conversation between Ms. Hook and the client, and another stylist was called in for assistance. Ultimately, the client told Ms. Hook she would send a cheque, which was

acceptable to Ms. Hook. Ms. Hook testified that when the cheque was not received by the next week, she asked the Complainant to call the client and remind her about the cheque, and the Complainant said she would. On September 29, Ms. Hook asked the Complainant if she had called. The Complainant replied that she had not, and that she would not call, believing that this was harassing and embarrassing the client. This was said in front of co-workers. Ms. Hook testified that the Complainant said she was not afraid of Ms. Hook and she was not going to obey her order. Ms. Hook told her that she should consider finding another job. During the conversation, the Complainant said that she would pay the client's bill herself, and be reimbursed when the cheque was received. Ms. Hook testified that following this, she overheard the Complainant tell a client that she didn't have to obey Ms. Hook and was leaving; at that point, Ms. Hook drew a line through the space available for the Complainant's upcoming appointments in the appointment book. She testified that it was her plan to fire the Complainant later that day. The Complainant worked the rest of her shift, but did not do the last client, who was a friend of Ms. Hook's. She asked if her pay was ready, packed up her tools, and left. The client paid the bill on September 30. Ms. Hook testified that she also heard Ms. Bourque tell another client she was leaving. The Complainant's clients called to cancel appointments that had been made, or didn't show up. One came in to get her "color card". She testified that two "perm cards" were missing, for clients serviced by the Complainant on her last day. Ms. Hook was aware that the Complainant had started at another salon early the next week, although she wasn't aware that there were any discussions with the new employer prior to the termination of employment.

The Complainant testified on her own behalf. She agreed with Ms. Hook's characterization of what occurred on September 22 in most respects. However, she testified that she told her client at that time that she would pay the bill and be reimbursed, but that Ms. Hook probably did not hear the offer. It was agreed the client would pay by cheque. The Complainant testified that she had done this client's hair for about two years, and that she came in every few weeks. She was quite quiet, and the Complainant felt that she was embarrassed by the fact that her card would not work, and that she was required to stay there quite a long time to sort it out.

The Complainant's version of events is that Ms. Hook asked her to place the reminder call on September 27. She did not agree that she would, but said that she would pay the account herself. She indicated to Ms. Hook that only three working days had passed, and the client should be given more time. On September 29, Ms. Hook again asked her to call the client, and the Complainant replied that she would not, that the client had been embarrassed enough, and that she would pay herself. She denied saying that the client had been "harassed" or saying that she wasn't afraid of her. Both she and Ms. Hook were angry. Ms. Bourque believed that by that point, the other staff members in the room had gone.

> Ms. Bourque testified that when she took her noon client to the desk to pay, she noticed that a line was drawn through her next week's appointments, and took this to mean that she was fired. She went to the back room, very upset. The client saw the appointment book. She hadn't said anything to the client about leaving, prior to seeing the appointment book. She admitted she told her afternoon clients that she was leaving, and didn't know where she'd be going. She denied removing any color or perm cards. She had two perm cards in her pocket when she left, not realizing she had them. She said that perm cards were not important.
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> Around six o'clock, Ms. Bourque asked for her 'pink slip', and Ms. Hook replied that she had a few days to provide it. Ms. Bourque packed her tools and left. She began inquiring about other jobs that weekend, and started a new job on Tuesday. She called as many of her clients as she could remember on the weekend, indicating that she was no longer with Zanzibar, and that she would let them know when she found a new job, indicating that they could be serviced at her new place of work, if they wished.

In addressing the issue of whether the complainant was guilty of "wilful misconduct" or "wilful disobedience" within the meaning of s. 72 of the **Code**, the tribunal said the following in its decision:

> On a preliminary point, the Tribunal is satisfied that the Complainant did not quit, but that she was fired. The statement made by Ms. Hook to her that she should find another job, followed closely by the act or removing her appointments from the book, indicate that she was terminated from employment and the actions were interpreted as such by the Complainant. The position of the Respondent, however, is that they had grounds to fire her without notice.
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> On the first issue - whether the employer had grounds to summarily dismiss the Complainant - we note that there was no evidence of similar incidents in the past, over a period of employment of fourteen years. To that extent, the incident between Ms. Bourque and Ms. Hook which occurred on September 29 was an isolated one.
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> We must determine not only whether there has been disobedience but whether that disobedience has been wilful. There was clearly a disagreement between the two women as to how to obtain payment from the client. Ms. Hook wanted Ms. Bourque to call and remind the client about the payment, while Ms. Bourque felt this was inappropriate, and that she would cover the payment herself and be reimbursed later. We are satisfied that Ms. Bourque made this offer to pay, at least on September 29. (The evidence is conflicting as to whether such an offer was made earlier). In our view, the fact that the Complainant offered to take care of the bill herself and be

> reimbursed later by the client affects both the wilfulness of her conduct, and the reasonableness of Ms. Hook's reaction.
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> The Complainant cannot be faulted for the fact that her client did not pay the Respondent. nor is there any question of the Respondent's right to ensure that such payment is received. However, one may ask whether the disagreement on how this should be done should be held to be sufficiently serious to eliminate an unblemished fourteen year record of service.
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> ...
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> We cannot conclude from the facts before us that either the seriousness of the disobedience or the intention manifested by the refusal to obey indicate, in effect, a repudiation of the contract of employment.

Further, we find that the employee's conduct here lacks the element of wilfulness that is required to justify summary dismissal. This was an unusual situation, which both parties wanted to resolve in their own way. Ms. Bourque's intention appeared to be to protect the client from embarrassment, rather than to defy her employer. Granted, she disagreed with Ms. Hook's direction to call the client. But her alternative approach - to pay the bill herself and be reimbursed later - was a reasonable one, and does not appear to have been seriously considered by Ms. Hook.

As a result the tribunal concluded that the respondent breached the provisions of s. 72 of the **Code** in terminating the appellant without notice or pay in lieu of notice.

In my opinion, there was evidence before the tribunal to support its conclusion. Further, those conclusions are not patently unreasonable, in the sense that the conclusions "are not clearly irrational, that is to say evidently not in accordance with reason" as per Cory, J. in **Attorney General of Canada v. Public Service Alliance of Canada** (1993), 101 D.L.R. (4th) 273 (S.C.C.) For these reasons I would dismiss these grounds of appeal.

I would, therefore, dismiss the appeal without costs.

Flinn, J.A.

Concurred in:

Hallett J.A.

Roscoe J.A.

C.A. No. 136304

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

ZANZIBAR'S UNISEX HAIRSTYLING LIMITED

Appellant

- and -

SHIRLEY A. BOURQUE and THE LABOUR STANDARDS TRIBUNAL and THE DIRECTOR OF LABOUR STANDARDS

Respondents

REASONS FOR JUDGMENT BY:

FLINN, J.A.